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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 72-1269

DONALD DAVIDSON,

Plaintiff-Petitioner,

against

THE LONG ISLAND RAILROAD COMPANY,

Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE DEFENDANT-RESPONDENT IN OPPOSITION

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April, 1973.

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is printed at pages A-1 and A-2 of the petition. It is reported at 469 F.2d 1404. The opinion of the United States District Court for the Eastern District of New York, which is printed at pages A-3 through A-5, inclusive, of the petition, is not reported.

Jurisdiction

The final decision of the Court of Appeals, Second Circuit, was entered December 19, 1972. The jurisdiction of the Court is invoked under 28 U.S. Code 1254(1).

Questions Presented for Review

1. Are there special and important reasons in this case to warrant the Court to use its sound judicial discretion of review pursuant to Rule 19 of the Supreme Court Rules on petitioner's writ of certiorari?

2. Does the statute of limitations bar the case where the plaintiff-petitioner waited beyond the allowed three years before filing the action?

3. Was it necessary to go through a trial in order to determine whether the plaintiff-petitioner waited beyond the allowed period of three years before filing this action?

Statement

(Figures in parentheses refer to page numbers in the printed record.)

This is a personal injury action brought by the plaintiff-petitioner, an employee of the defendant-respondent, The Long Island Rail Road Company, against said defendant-respondent pursuant to the Federal Employers' Liability Act (45 U.S.C.A. Secs. 51 et seq.) in the United States District Court, Eastern District of New York.

Defendant-respondent moved for summary judgment dismissing the complaint on the basis of the defense of statute of limitations pleaded in its answer, and supported by affidavits, which was granted (5a-8a).

The plaintiff-petitioner appealed from the judgment of dismissal entered against him in the office of the Clerk of the United States District Court, Eastern District of New York, on May 19, 1972, upon the order of Judge Orrin G. Judd, granting summary judgment herein (5a-8a). The United States Court of Appeals for the Second Circuit, after argument by counsel representing the respective parties, on December 19, 1972, affirmed the judgment of the said District Court.

Facts

Defendant-respondent disagrees with the statement of facts of the case as presented in the petition for certiorari, and in lieu thereof, sets forth the following:

The summons and complaint in the action were filed November 2, 1971 (23a-24a).

The complaint recites that the plaintiff-petitioner was in the act of operating a switch on or about November 1, 1968, "and in the course of his employment, he was caused to sustain serious and severe personal injuries" (14a).

On the same evening, the plaintiff-petitioner reported the aforementioned accident to his supervisor "and wished to make out an accident report" (35a) and that he was "going to Good Sam(aritan) Hospital" (37a).

The accident was reported to have occurred at approximately 8:30 P.M. on November 1, 1968, and the plaintiff-petitioner described the "Nature of Injury" as "lower back pains" and the cause as "switch difficult to throw" (37a).

Title 45 U.S.C.A., Section 56, states in part:

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

The answer of the defendant-respondent denied generally the allegations of the plaintiff-petitioner's complaint, and in addition thereto, alleged several affirmative defenses, including the plaintiff-petitioner's failure to commence his action within the three-year statute of limitations as required by law.

The motion to dismiss the complaint and for summary judgment brought by the defendant-respondent was granted below by Judge Judd (5a-8a) which dismissal was affirmed by the Court of Appeals, Second Circuit, on December 19, 1972.

POINT I

Certiorari ought to be denied as there are no special or important reasons contained herein to warrant the Court to use its sound judicial discretion pursuant to Rule 19 of the Supreme Court rules.

Summary judgment did not infringe upon the plaintiff-petitioner's constitutional right to a trial by jury since the District Court determined, and the Court of Appeals affirmed, that there was no genuine issue as to material fact relevant to the time of the commencement of the statute of limitations, and that the moving party was entitled to judgment as a matter of law.

Simply stated, the plaintiff-petitioner sustained his injury on the same day of the accident, which was November 1, 1968. This is verified by a reading of the accident report which was prepared the same day at plaintiff-petitioner's request. Plaintiff-petitioner reported that he had suffered lower back pains while throwing a switch and that he was going to Good Samaritan Hospital (37a).

Since the plaintiff-petitioner commenced his action on November 2, 1971, or three years and one day after his cause of action accrued, his claim was properly barred by the three-year statute of limitations as a matter of law.

Certiorari is normally only granted by the Supreme Court in cases involving issues of importance which it is in the public interest to have decided by the court of last resort or where it is necessary to secure uniformity between the courts of the various circuits. See: *Magnum Import Co.* v. *Coty,* 262 U.S. 159 (1923); *Rice* v. *Sioux City Mem. Parks Cemetery,* 349 U.S. 70 (1955).

In the instant case, as will be shown below, there is no conflict between the courts of the various circuits nor is there any issue of major public importance. All jurisdictions agree that where an injury is the result of a specific and identifiable occurrence, the cause of action accrues at the time of the occurrence and not at the time the extent of injury is discovered. All jurisdictions agree that the statute of limitations commences to run at the time the cause of action accrues and not when the extent of injury is discovered.

These issues have been dealt with many, many times by all courts in a consistent manner and plaintiff-petitioner raises no issue of conflict or of major importance which should be dealt with by this Court.

POINT II

The Court properly held that the mere fact that the extent of damage was not immediately manifested, did not postpone the accrual of plaintiff-petitioner's cause of action and that since it was clear that plaintiff-petitioner waited beyond the allowed period of three years before filing his action, it was unnecessary to go through a trial.

This Court is respectfully referred to the opinion of Judge Orrin G. Judd (6a-7a), wherein the following language appears:

> "The complaint in the action was filed on November 2, 1971. The complaint recites that plaintiff was in the

COPY BOUND CLOSE IN CENTER

act of operating a switch on or about November 1, 1968 'and in the course of his employment, he was caused to sustain serious and severe personal injuries.' Paragraph Fifteenth. The accident report, presented [by defendant, shows that the accident was reported]* at 8:30 p.m. on November 1, 1968 and that plaintiff described the 'Nature of Injury' as 'lower back pains' and the cause as 'switch difficult to throw.' The opposing papers recite that plaintiff reported the incident to his superiors as a means of notifying them that the switch was defective 'and also to take into account the possibility that this incident may develop into an injury manifesting itself sometime after the occurrence of this particular incident.' Plaintiff remained at the yard until the completion of his shift, was taken home by a fellow employee, and then was examined as an emergency patient in Good Samaritan Hospital in the morning hours on November 2, 1968 and sent home with a diagnosis of 'pulled muscle.'

["A three-year statute of limitations is provided in the Federal Employers Liability Act, which states (45 U.S.C. § 56:]**

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

"A cause of action accrues at the time of the injury. *Rodzek* v. *N. Y. Central R. R. Co.,* 169 F. Supp. 803, 805 (E.D. Mich. 1959). In connection with an injury on a railroad, the cause of action accrues on the date of the accident, and not at a later time when the plaintiff learns the full extent of his injuries. *Deer* v. *N. Y. Central R. R. Co.,* 202 F.2d 625 (7th Cir. 1953); *Bras-*

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* inadvertently omitted at page 6a of the record.

** inadvertently omitted at page 7a of the record.

sard v. *Boston & Maine Railroad,* 240 F.2d 138 (1st Cir. 1957).

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"Where it is clear that a plaintiff has waited beyond the allowed period of three years before filing action, it is unnecessary to go through a trial, and the case should be dismissed."

The plaintiff-petitioner knew the facts of his injury and that it was serious and actionable. The fact that he did not at the time know its full extent does not avoid the prescription of the three-year statute of limitations.

"If the theory of plaintiff be followed to a logical conclusion, a person might suffer a trifling injury in his youth, and live to a ripe old age before bringing suit. The law does not contemplate such an absurdity. It is only when one does not know that he has suffered an actionable injury that the statute is tolled. Whether his damage be slight or his injury apparently temporary, or that subsequent developments may entitle him to larger damages, is immaterial." *McLaughlin* v. *Western Union Telegraph Co.,* 17 F.2d 574 at page 576.

There is nothing to the contrary in *Shuttleworth* v. *Crown Can Co.,* 165 F.2d 974 (7th Cir. 1948) which plaintiff-petitioner cites, and, in fact, it does not even deal with the question of when a cause of action accrues or when it is barred by the statute of limitations. That case, affirming a judgment for defendant, stated that injury was part of the requirement of a cause of action for negligence, but it did not say that the cause of action accrues when the injured party arrived at the hospital rather than when the accident occurs.

The cases cited by the plaintiff-petitioner with respect to the tolling of the statute of limitations such as *Prosch* v. *Yale,* 306 F. Supp. 524; *R. J. Reynolds Tobacco Company* v.

Hudson, 314 F.2d 776 (1963); *Tiller* v. *Atlantic Coast Line,* 323 U.S. 574, 655 S. Ct. 621, 89 L.Ed. 465 and *Urie* v. *Thompson,* 337 U.S. 163, 69 S. Ct. 1018, 93 L.Ed. 1282, are clearly distinguishable from the present case.

Prosch v. *Yale, supra,* involves a products liability case. The Court held that the statute of limitations begins to run when the injury occurs to the user of the product, not the date said product was put on the market.

The injury arising from a specific incident such as in the present case is not like a products liability case where the injury occurs after the product has left the defendant's hands.

R. J. Reynolds Tobacco Company v. *Hudson, supra,* is another products liability case. The plaintiff in that case allegedly contracted cancer of the larynx caused by smoking defendant's tobacco products over many years. No specific date of contact with the substance could be charged with being as the date of injury, and as a consequence, summary judgment was denied.

The Court said at page 779:

> ". . . Cancer comes like a thief in the night. Assuming, as we must for the purposes of this appeal, a nexus between cancer and smoking, no one can say when Hudson's cancer first came into existence. Only by a trial on the facts can it be determined when Hudson knew or should have known that he might have an actionable injury he could attribute to smoking."

Tiller v. *Atlantic Coast Line, supra,* merely held that the plaintiff had the right to amend his complaint to allege an additional cause of action under the Boiler Inspection Act. The Court held that since the claim asserted by the amended complaint arose out of the same conduct, transaction and occurrence set forth in the original complaint, the statute of limitations would be tolled for that special purpose.

At page 580, the Court stated:

> "We are of the opinion that the amendment was properly permitted. Section 15(c) of the Federal Rules of Civil Procedure provides that 'Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.' "

Urie v. *Thompson, supra,* involves a case of a locomotive fireman contracting silicosis over a long period of time during the course of his employment. The result of inhaling silica dust gave rise to a cause of action under the Federal Employers' Liability Act. Again, as in *R. J. Reynolds Tobacco Company* v. *Hudson, supra,* no specific date of contact with the substance could be charged with being as the date of injury.

The Court held that the plaintiff's contraction of silicosis resulted from the inhalation of silica dust over a period of thirty years and he may have had silicosis without knowing it for more than three years before he sued for compensation under the Federal Employers' Liability Act, did not bar his claim when the time which elapsed between his discovery of his condition and the filing of suit did not exceed three years, the period of limitations then prescribed by that Act.

But, in the present case, the date of injury was the date when plaintiff-petitioner found it difficult to throw the switch and reported that he had been injured, and was suffering low back pains.

Conclusion

The decision below is consistent with the authority of this and all other federal courts. The plaintiff-petitioner's contention that his constitutional right of trial by jury has been unlawfully denied is without support.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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